

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
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Date: September 25, 1998

Case No: 97 INA 260

In the Matter of:

SADANAND HOME, INC., Employer

on behalf of

NIRMAL CHOPDE, Alien.

Appearances:

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of NIRMAL CHOPDE (Alien) filed by SADANAND HOME, INC., (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at Philadelphia, Pennsylvania, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met.

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.²

STATEMENT OF THE CASE

Application. On August 6, 1996, the Employer applied for labor certification to enable the Alien, a national of India, to fill the job of "Office Manager" in its Elderly Care Home. AF 182-185. The position was classified under the DOT Occupational Title of "Office Manager, No. 169.167-034."³ Employer described the job as follows:

Coordinates activities of company clerical personnel: Analyses and organizes office operations and procedures. Establishes uniform correspondence procedures and style practices. Formulates procedures for systematic retention, protection, retrieval, transfer, and disposal of records. Plans office layouts. Reviews clerical and personnel records to insure completeness, accuracy, and timeliness. Prepares activities reports for guidance of management. Prepares employee ratings and schedules.

(Copied verbatim without correction.) Employer offered a salary of \$37,800 per week based on a forty hour week from 9:00 AM to 5:00 PM. No formal educational requirement was stated, but Employer required two years of experience in the Job Offered or in the Related Occupation of Operations Manager. The Other Special Requirements were the following: "Two (2) years of experience managing inventory control; Two (2) years of experience preparing daily employee schedules; and Two (2) years of experience manages at least five (5) employees. All experience may have been gained concurrently." AF 182. The Employer's recruitment effort resulted in one hundred and seven responses and referrals, none of whom was hired. AF 82-103.

Notice of Findings. The Certifying Officer (CO) issued a Notice of Findings (NOF) on November 14, 1996, citing 20 CFR §§ 656.20(c)(8)656.21(b)(2) and 656.21(b)(6), and advising Employer that

²Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

³**169.167-034 MANAGER, OFFICE** (any industry) alternate titles: chief clerk; manager, administrative services Coordinates activities of clerical personnel in establishment or organization: Analyses and organizes office operations and procedures, such as typing, bookkeeping, preparation of payrolls, flow of correspondence, filing, requisition of supplies, and other clerical services. Evaluates office production, revises procedures, or devises new forms to improve efficiency of workflow. Establishes uniform correspondence procedures and style practices. Formulates procedures for systematic retention, protection, retrieval, transfer, and disposal of records. Plans office layouts and initiates cost reduction programs. Reviews clerical and personnel records to ensure completeness, accuracy, and timeliness. Prepares activities reports for guidance of management, using computer. Prepares employee ratings and conducts employee benefit and insurance programs, using computer. Coordinates activities of various clerical departments or workers within department. May prepare organizational budget and monthly financial reports. May hire, train, and supervise clerical staff. May compile, store, and retrieve managerial data, using computer.
GOE: 07.01.02 STRENGTH: S GED: R4 M3 L4 SVP: 7 DLU: 88

certification would be denied, subject to rebuttal. AF 81-74. Under 20 CFR § 656.21(b)(2) the CO required Employer to establish that two years of experience in the Job Offered or in the Related Occupation was the normal hiring criterion for this position and was required for the performance of the duties of the job in the United States. In the alternative, the NOF required that the Employer prove the business necessity of this standard, which the CO said appeared to be unduly restrictive as stated in the application. As the work of an "Operations Manager" was not the same as an "Office Manager," the work the Alien had performed in the past, it was necessary that the Employer demonstrate that the duties in both job were materially similar in the context of this application. Moreover, the CO added that the "Other Special Requirements" were misleading and could serve as a basis for the rejection of otherwise qualified U. S. workers.⁴ As Employer's recruiting advertisement uniquely reflected this requirement, the NOF required the Employer to establish the business necessity of these added special job requirements, and the CO specified the nature and content of the evidentiary proof needed for this purpose. In addition, noting that these unduly restrictive requirements suggested that the job offer was tailored to the Alien's unique experience and was not clearly open to any qualified U. S. worker in violation of 20 CFR § 656.20(c)(8). For this reason the CO further required the Employer to demonstrate that the job had existed and was previously filled under the same requirements before the Alien was first hired, or that a major change in business operations had caused this job to be created after the Employer hired the Alien. AF 76-77.

Because one hundred and seven U. S. applicants applied and were rejected for this job, the NOF addressed the issues under 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) by discussing the details of only a limited number of the candidates that the Employer found to be unacceptable. The Employer rejected twenty-three U. S. job applicants whom it required to send "documentary evidence" in addition to their resumes, placing an additional burden on other-wise qualified applicants that the Employer apparently found was not met when it rejected them. Eleven of those twenty-three U. S. workers complied by providing the information Employer wanted, however, and were rejected because their submissions failed to document one or another of the types of experience listed at Item 15 of ETA 750A. As at least eight of the twenty-three applicants did have such experience and the Employer never recontacted any applicants to alert them to a deficiency in their documentation, the NOF questioned the *bona fides* of the Employer's recruitment process. The CO directed the Employer to discuss (1) the "evidence" it "would consider as documenting prior experience," (2) the reasons it failed instead to contact the applicants' employers to determine their experience, and (3) explain its failure to recontact these applicants to secure the specific information required.

The CO then listed and discussed the details of the resumes of eight candidates whose resumes and documentation demonstrated to be qualified for the position Employer offered to the Alien. The CO stated that Employer's rejection of nine candidates in favor of the Alien could not be found to be based on reasons that were lawful and job related. The applicants were Mr. Barnett, Mr. Daniels, Ms. DeFalco, Mr. Lee, Ms. Millard, Ms. Vogel, Ms. Weston, Mr. Hagerman, Ms. Jansen, and Ms. Miguel. As the Employer has the burden of proving that U. S. workers are not able, willing, qualified, and available for this position, Employer's failure to prove that it rejected U.S. workers for reasons that were lawful and job-related was

⁴The CO specified one well qualified candidate who was rejected by the Employer under circumstances that closely fitted this comment.

contrary to the regulations cited by the NOF as a further basis for the denial of alien labor certification under the Act. AF 79-81.

Rebuttal. The cover letter with Employer's January 23, 1997, rebuttal said it amended the application, and it offered added evidence and a brief by counsel.⁵

Final Determination. The CO's Final Determination denying certification was issued on February 20, 1997. AF 08-15. (1) The CO rejected Employer's rebuttal argument and concluded that the Employer failed to document its contention that its restrictive hiring criteria for this position are those normally required for the performance of this job in the United States. The CO then concluded under 20 CFR § 656.21(b)(2) that Employer's hiring criteria were in fact unduly restrictive and the Employer failed to sustain its burden of proving that the job was clearly open to any qualified U. S. worker under 20 CFR § 656.20(c)(8) because its job requirements were unduly restrictive for the reasons described in the NOF. (2) Traversing each and every one of the Employer's responses to the deficiencies in its treatment of eleven named candidates for the job, the CO rejected Employer's rebuttal under 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), and concluded that the Employer failed to establish that it rejected the U. S. job applicants on grounds that were both lawful and job related. AF 12-15.

Appeal. On March 27, 1997, the Employer appealed to BALCA. The Employer's appeal included a letter-brief responding to the findings of the CO in the Final Determination. AF 01-07.

Discussion

As the Employer observed in its brief, the NOF is required to give notice that is adequate to provide an opportunity for the employer to rebut or cure the defects found. **Downey Orthopedic Medical Group**, 887 INA 674(Mar. 16, 1988)(*en banc*). This Notice of Finding clearly stated the deficiencies in the documentation supporting Employer's application, and itemized the detailed proof their rebuttal required.

The central issue concerns the implementation of the hiring criteria encompassed by the "Other Special Requirements" in the administration of the recruiting process. The Employer required two years of experience managing inventory control, two years of experience preparing daily employee schedules, and two years of experience in managing at least five employees. While several of the resumes in the record showed the requisite experience in managing more than five clerical employees and in the management of inventory control, the Employer rejected a majority of the candidates listed in the NOF and in the Final Determination on the grounds that applicants' qualifications in the preparation of daily employee schedules

⁵The rebuttal evidence included a letter relating to Adisak Nernbok, the Alien in another application which is not relevant to the facts of this case. AF 24-30. It also included a letter by a person connected with a personnel recruiting firm in the business of recruiting temporary office workers for the employers with whom it deals. In addition to general statements, the writer sent photocopies of responses to three inquiries in a "survey" related to the hiring of a social secretary. AF 31-38. Lastly, the Employer included copies of two letters from the Alien's former employer to indicate his qualifications. AF 39-40.

were inadequate. Because it is clear from Form ETA 750A that this Office Manager is in charge of five or more clerical workers, the CO reasonably inferred that the only daily work this manager is expected to control consists of the quotidian duties of the members of that small group of roughly five office workers.

Although placed on notice by the NOF findings and the Final Determination, the Employer did not suggest in either the Rebuttal or the brief that this inference was wrong or that the manager would prepare the daily schedules of any of Employer's personnel beyond the office that this worker was hired to supervise. In spite of this, when Employer's Rebuttal addressed this issue, its spokesman argued that,

Planning daily employee schedules may seem relatively insignificant on the surface. The operational word here, though, is 'planning.' All aspects of personnel administration go into planning daily schedules. The who, what, when, where, why and how of each employee, then the group as a company, must be considered. Control of this aspect of administration will permit me to maximize efficiency of employees. However, in so doing this could also increase our potential exposure to liability for negligence. An error in daily scheduling could result in improper care for an ailing resident with resultant harm and damages. This is why I placed such great importance on this experience. This cohesive focus such a position will bring is lacking at the Home right now and an area that I must address a[s] soon as possible.

AF 18-19. In the Final Determination the CO referred to this in concluding,

Although you have stated [that the] operations manager is the same as office manager and have amended the ETA 750 B form [stating the Alien's qualifications], this position is managing 5 clerical personnel. Your statements about scheduling the clerical employees resulting in life threatening situations must be viewed as exaggerated.

Moreover, the Employer's reasons for rejecting Ms. Weston unmistakably confirmed the CO's inference that the Employer did not determine the candidates' qualifications by following a critical hiring standard that modified its Special Requirements in Form ETA750A:

All experience may have been gained concurrently.

AF 182. In rejecting Ms. Weston Employer ignored this criterion and clearly rejected the premise that an office manager could simultaneously acquire experience in more than one of the Special Requirements listed in its application. AF 14.

Based on these reasons the panel agrees with the conclusion of the CO that the Employer's Job Duties and Special Requirements were unduly restrictive within the meaning of 20 CFR 656.21(b)(2) after considering the Rebuttal and Employer's brief with the entire record. The panel is aware that the it has not addressed CO's further findings under 20 CFR §§ 656.20(c)(8) and 656.21(b) (6) that the Employer failed to establish that it rejected the U. S. job applicants on grounds that were both lawful and job related. Because we have affirmed the CO's finding that Employer's hiring criteria were unduly restrictive, however, Employer's use of such criteria in the hiring process foreclosed any possibility that it could demonstrate

that it rejected the well qualified U. S. workers discussed in the NOF and Final Determination for reasons that were lawful and job related.

For these reasons we find that there is sufficient evidence to support the CO's conclusion that the Employer failed to prove that its job requirements were not unduly restrictive within the meaning of 20 CFR 656.21(b)(2) and that the Certifying Officer's denial of alien labor certification should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.